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No. 80-2147

In the Supreme Court of the United States

OCTOBER TERM, 1981

CONNECTICUT, ET AL., PETITIONERS

v.

WINNIE TEAL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964 allows an employer to show that an employee selection procedure as a whole does not have a disparate racial impact in order to rebut a showing that a single component of the process does have such an impact.

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INTEREST OF THE UNITED STATES

The responsibility for federal enforcement of Title VII of the Civil Rights Act of 1964 is shared by the Department of Justice and the Equal Employment Opportunity Commission (EEOC).* The Attorney General has authority to bring civil actions against state and local government employers. 42 U.S.C. (& Supp. III) 2000e-6. The Commission has authority to bring civil actions against private employers under 42 U.S.C. 2000e-5(f)(1). This case concerns the availability of the "bottom line" defense in Title VII suits, a question concerning the scope of the Act that may affect federal administration and enforcement.[1]

* The EEOC has declined to join in this brief.

[1] In 1978, the Department of Justice and the EEOC, together with the Department of Labor and the Civil Service

STATEMENT

This action was filed on April 6, 1979, against petitioners (the State of Connecticut, two state agencies and two state officials) by eight employees of one of the agencies, the Department of Income Maintenance. Four of the plaintiffs are black; four are white (Pet. App. 19a). The only claim of the black plaintiffs at issue before this Court is the allegation that their employer violated Title VII of the 1964 Civil Rights Act (42 U.S.C. 2000e *et seq.*) by using, as part of a selection process for promotions, a written test that was not job-related and that excluded blacks in disproportionate numbers from further participation in the selection process.[2] Respondents claimed both that the test constituted intentional disparate treatment and that, in any event, it had a racially disparate impact prohibited

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Commission, issued Uniform Guidelines on Employee Selection Procedures, 28 C.F.R. 50.14, 43 Fed. Reg. 38290 (1978). Section 4C provides that where the total employee selection process does not have an adverse impact on a protected group, the federal agencies as a matter of prosecutorial and administrative discretion will not, in the absence of circumstances not present in this case, take enforcement action against an employer or expect employers to validate separate parts of the selection process. See *infra*, pages 16-17 & n. 15.

[2] The black plaintiffs also asserted violations of 42 U.S.C. 1981, and the Equal Protection Clause of the Fourteenth Amendment under 42 U.S.C. 1983. One black plaintiff alleged that she was terminated in retaliation for filing discrimination charges. All plaintiffs asserted a due process claim under 42 U.S.C. 1983 and a claim that the test violated a Connecticut statute requiring state employment tests "to measure the knowledge, skill or ability required to perform the duties of the job" (Pet. App. 26a). The district court rejected these claims (Pet. App. 24a-26a). None of them are at issue in this Court.

by Title VII (see *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971)). The employer claimed that no violation of Title VII occurred because the test was job-related and because, in any event, the overall promotion process did not have a disparate impact on blacks.[3]

Respondents took the challenged test in December 1978 as the first part of a promotion process for selecting Welfare Eligibility Supervisors (Pet. App. 7a). At the time they took the test, respondents held provisional appointments in these supervisory jobs (Pet. App. 6a).[4] Because they failed to pass the test, they were excluded from further consideration for permanent appointment to these positions (Pet. App. 7a).

The test results, broken down by race, are as follows (Pet. App. 20a):

	# taking test	# passing test	% passing test
Black	48	26	54.17
Hispanic	4	3	75.00
Indian	3	2	66.67
White	259	206	79.53
Unidentified	15	9	60.00
	329	246	74.77

These results are based on a passing score that was set at 65 rather than 70 in order to lessen the severity

[3] Most of the evidence before the district court related to the employer's claim that the test was job-related—*i.e.*, the validation issue.

[4] A total of 41 individuals (10 black and 31 white) held such provisional appointments (Tr. 239, 247 (May 27, 1980)).

of the disparate racial impact (Tr. 328 (May 28, 1980)). However, even using the lower score, the passing rate for all blacks was still only 68% that for white candidates, which establishes adverse impact under the "four-fifths" rule of thumb defined by Section 4D, Uniform Guidelines on Employee Section Procedures (1978) (28 C.F.R. 50.14(4D)).[5]

This action was filed before any promotions were made (Pet. App. 9a). Initially, respondents sought a court order to prevent promotions based on the test results; because petitioners agreed not to act until the case was tried, no order was issued. Although the record does not directly address this point, petitioners have informed us that when they later sought court permission to make promotions, the court allowed them to go forward if slots were left open for respondents should they ultimately prevail (see Pet. Br. 5 n. 3).

Under state law, all persons who passed the test and whose scores fell in the top five ranks could be considered for each job opening (Tr. 247 (May 27, 1980); Tr. 356 (May 28, 1980)).[6] For each additional vacancy, the scorers in the next lower rank could also be considered (Tr. 249 (May 27, 1980)). Because there were 46 vacancies and only a total

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[5] Section 4D provides in relevant part:

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

[6] Each rank was composed of individuals receiving the same score (Tr. 247 (May 27, 1980)).

of 25 ranks among those who passed the test, the effect of the state law was that all persons who passed could be considered (Tr. 249 (May 27, 1980); Tr. 356 (May 28, 1980)).[7]

The final promotion decisions were based primarily on past work performance and supervisors' recommendations; seniority was also considered (Pet. App. 7a). In addition, the state employed an affirmative action program to insure that minorities were well represented in the supervisory positions (*ibid.*). Forty-six persons, 11 blacks and 35 whites, were promoted to permanent supervisory positions (Pet. App. 9a). There apparently was an effort to promote as many provisional appointees who passed the test as possible (Tr. 247 (May 27, 1980)); all five black provisional appointees who passed the exam received promotions (Tr. 239 (May 27, 1980)). In all, 23% of the blacks and 13.5% of the whites who began the selection process were promoted (Pet. App. 20).[8]

2. The district court entered judgment for the employer. The court determined (Pet. App. 22a) that the case was properly viewed as a disparate impact case; indeed, the court found (Pet. App. 24a) that "evidence of discriminatory motive was wholly absent." In assessing the disparate impact claim, the court looked to the ultimate promotion results, not to the test results; because the promotion rate for blacks was greater than that for whites, the court ruled that plaintiffs had failed to show a disparate

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[7] The record does not disclose the scores of the persons who were ultimately promoted or the scores respondents received.

[8] These promotions resulted in a 17% black supervisory work force (Tr. 240 (May 27, 1980)). There was only one black in a permanent supervisory position prior to the time the promotions were made (*ibid.*).

impact (Pet. App. 24a). The court thus found it unnecessary to reach the question whether the test was job-related (Pet. App. 26a).

3. The court of appeals reversed, holding (Pet. App. 5a) that when a "plaintiff establishes that a component of a selection process produced disparate results *and* constituted a pass-fail barrier beyond which the complaining candidates were not permitted to proceed, a prima facie case of disparate impact is established, notwithstanding that the entire selection procedure did not yield disparate results."

The court distinguished this case from one where a portion of a job selection process may have an adverse impact and the selection process as a whole does not, but where all candidates participate in the entire process notwithstanding poor performance on the component having adverse impact (Pet. App. 11a-14a). The court suggested that use of such a process could make it difficult to identify either the discriminatory component or the affected individuals. In such a situation, therefore, the court of appeals found that the "prudent course to pursue" (Pet. App. 12a) was the application of the so-called "bottom line" theory: the results of the entire selection process should be the measure of adverse impact. Here, however, where "an identifiable pass-fail barrier denies an employment opportunity to a disproportionately large number of minorities and prevents them from proceeding to the next step in the selection process" (*ibid.*), the court concluded that the barrier must be shown to be job-related. The court thus determined that the employer's affirmative action steps taken at the end of the promotion process would not relieve the employer of Title VII liability to persons "who have been victimized by a discriminatory

pass-fail barrier, notwithstanding any belated 'corrective' action taken by the employer" (Pet. App. 14a). The case was remanded to the district court for an evaluation of the job-relatedness of the test (Pet. App. 16a).[9]

SUMMARY OF ARGUMENT

1. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), this Court interpreted Title VII of the Civil Rights Act of 1964 to prohibit the use of employment tests and other employee selection devices that have a disparate racial impact and are not shown by the employer to be job-related. Here respondents proved the test's disparate impact on blacks, but the employer showed that other parts of the promotion process eliminated that effect, so that blacks were fairly represented among the employees selected for promotion. In this circumstance, Title VII affords no remedy in the absence of purposeful discrimination.

Congress did not intend Title VII to require an employer to establish that every test or other employee selection device is job-related. That burden is imposed only where there is a discriminatory impact

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[9] The court of appeals agreed (Pet. App. 11a) with the district court that the case should be analyzed as a disparate impact case rather than a disparate treatment one, because under the latter theory, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), requires plaintiffs to prove they are qualified for the jobs as part of their prima facie case. Here, the court of appeals reasoned, that would require plaintiffs to prove that the test was *not* job-related. In a disparate impact case, on the other hand, plaintiffs need only establish that a test has a disparate racial impact and the burden is then on the employer to prove that the test is job-related.

in the employment decision, because Title VII's sole purpose is to eliminate such discrimination. The statute was not intended to intrude on traditional management prerogatives in devising the particular processes by which employment decisions are made. The employer here insured that his promotion decisions did not have the effect of excluding disproportionate numbers of blacks from the jobs; Title VII does not require that he also establish that the test was the best, or even a generally fair, means of reaching those nondiscriminatory decisions.

Focusing on the disparate racial impact of intermediate steps in a selection process instead of the effects of the entire system could require the courts to evaluate an employer's justification for every part and perhaps every subpart of the process. The court of appeals recognized this practical difficulty, but its attempt to limit its holding was illogical. The court ruled that an employer is not required to validate a single component of a selection process that does not exclude individuals from participation in other parts of the process. Yet the unvalidated component could have precisely the same effect on individual candidates as the challenged system if the employer gives significant weight to test scores in making his final selection among the eligible candidates. Thus, requiring test validation under one circumstance and not the other exalts form over substance. In sum, since the overall selection process did not have a disparate impact, there was no Title VII violation.

2. Plaintiffs did not rebut the employer's showing that the overall selection process was nondiscriminatory. Although they established the disparate impact of the test, they elicited no reason for not accepting the final promotion results as a

proper measure of the propriety of the selection process. There was no suggestion that the applicant figures were artifically depressed because blacks were discouraged from applying. The evidence did not establish that the employer eventually promoted a large number of blacks in order to avoid liability to plaintiffs. There was no proof that this test had the effect of locking in prior patterns of discrimination. In these circumstances, the results of the overall selection process establish that there is no violation of Title VII in this case.

ARGUMENT

I

TITLE VII DOES NOT REQUIRE AN EMPLOYER TO PROVE THE JOB-RELATEDNESS OF AN EMPLOYMENT TEST THAT HAS A DISPARATE RACIAL IMPACT ON MINORITIES WHERE THE TEST IS PART OF A SELECTION PROCESS THAT, AS A WHOLE, DOES NOT HAVE SUCH AN IMPACT

A. Title VII prohibits the use of unvalidated employee selection devices only where there is discriminatory impact in the making of employment decisions

Title VII of the 1964 Civil Rights Act, 42 U.S.C. (& Supp. III) 2000e *et seq.*, was enacted in order "to achieve equality of employment opportunities." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429. (1971). Section 703(a)(2), 42 U.S.C. 2000e-2(a)(2), of the Act makes it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race * * *." Notwithstanding that provision, Section 703(h) provides that the use of a "professionally developed ability

test" in an employee selection process shall not constitute an unlawful employment practice "provided that such test, its administration or action upon the results is not designed, intended or used to discriminate becasue of race * * *."

From the language of the statute, one could argue, on the one hand, that the test here, if it is not job-related, was "used to discriminate" within the meaning of Section 703(h) because it excluded a disproportionate number of blacks from further consideration for promotion. On the other hand, it was not "used to discriminate" in that it did not deprive disproportionate numbers of blacks of the actual promotions. We believe that the latter interpretation better serves Congress' intent in enacting Title VII.

In *Griggs, supra*, this Court set forth the standards for determining when the use of an employment test violates Section 703(a)(2) and (h). The Court concluded, 401 U.S. at 432, that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." Thus, Title VII proscribes "not only overt discrimination but also practices [such as employment tests] that are fair in form, but discriminatory in operation," 401 U.S. at 431, and places upon employers the burden of showing that "any given requirement" has "a manifest relationship to the employment in question," 401 U.S. at 432.

But Title VII does not require proof of job-relatedness (validation) of every employee selection procedure absent a showing of discriminatory effect. In *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975), this Court made clear that the employer's burden of proving the job-relatedness of a particular job requirement arises "only after the complaining

party or class has made out a prima facie case of discrimination, *i.e.*, has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants." Thus, while the court of appeals is correct in stating (Pet. App. 12a) that Title VII was designed to protect individual employment rights, a disparate impact claim as articulated in *Griggs* and *Albemarle Paper* can be established only by proving an actual discriminatory effect on employee selection. Here, there was none.[10]

In both *Griggs* and *Albemarle Paper*, the discriminatory effects of the employment tests were reflected in the eventual employment decisions. Here, by contrast, the employer utilized other parts of the process to eliminate the adverse racial impact of the test. This promotion test was thus not a "controlling force" as in *Griggs*, 401 U.S. at 436, nor did the use of the test result in selections for promotion in a significantly different racial pattern from that in the applicant pool as in *Albemarle Paper*, 422 U.S. at 425. *Griggs* and *Albemarle Paper* also dealt with practices which "operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs*, *supra*, 401 U.S. at 430. The test here did not have such an

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[10] It is well established (*Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 579 (1978); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280-281 n. 8 (1976); *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971)) that the overall selection process' lack of a discriminatory impact would not defeat a claim of *intentional* discrimination, although it could be relevant to such a claim. See *McDonnell Douglas Corp.* v. *Green*, *supra*, 411 U.S. at 804-805; *Furnco Construction Corp.*, *supra*, 438 U.S. at 580; *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 584 n. 25 (1979). The district court here found (Pet. App. 24a) that "evidence of discriminatory motive was wholly absent."

effect. Indeed, the overall promotion process had the opposite effect. The percentage of blacks in the supervisory workforce increased from 4% to 17% as a result of these promotions. Title VII should not be interpreted to require validation of an employment test that is only a single component of a selection process that overall is not only "fair in form," but also "[non]-discriminatory in operation." *Griggs*, *supra*, 401 U.S. at 431.

Indeed, a basically similar claim was before this Court in *Espinoza* v. *Farah Manufacturing Co.*, 414 U.S. 86, 92 (1973), where the Court held that an employer's rule against hiring non-citizens had neither the purpose nor the effect of excluding persons of Mexican origin from employment. In determining whether the policy had a discriminatory effect on persons of Mexican origin, this Court looked to the proportion of persons of Mexican origin in the employer's workforce as a whole and in the job category and actual position for which plaintiff applied. It did not consider dispositive the fact that some persons of Mexican origin (and probably very few, if any, others) were excluded by the citizenship requirement.[11]

B. Focusing on the final results of the selection process serves the congressional purpose in enacting Title VII

1. Congress did not intend Title VII to intrude unnecessarily on employer prerogatives in selecting employees, but only to insure that artificial barriers would not deny equal employment opportunities

Title VII encourages voluntary compliance. Indeed, "[c]ooperation and voluntary compliance were selected as the preferred means" for achieving the Act's

[11] The record in *Espinoza* did not show the extent, if any, of disparate impact of the challenged employment practice.

goals. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). Consistently with this approach of encouraging the private sector to take "effective steps to accomplish the goal that Congress designed Title VII to achieve" (*United Steelworkers of America* v. *Weber*, 443 U.S. 193, 204 (1979)), this Court has admonished against interpretations of Title VII that would "diminish traditional management prerogatives while at the same time impeding attainment of the ultimate statutory goals" (*United Steelworkers of America* v. *Weber*, *supra*, 443 U.S. at 207). The court of appeals here adopted just such an interpretation in requiring the validation of every intermediate selection procedure having a disparate racial impact, even though the employer has insured that the process as a whole results in promotions free from prohibited racial bias. An employer who insures that the results of his selection process are free from adverse impact should be allowed to exercise his management prerogatives concerning the details of that process without fear of liability to unsuccessful applicants. *Weber*, *supra*, 443 U.S. at 209-211 (Blackmun, J., concurring).

Nothing in Title VII prohibits an employer from basing nondiscriminatory employment decisions in part on unvalidated tests. The Act is designed to eliminate discrimination from employment decisions, not to guarantee that such decisions will be logically sound. In *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 578 (1978), this Court cautioned against interpreting Title VII to require employers to use the "best" hiring procedures, noting that "[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." In the absence

of discrimination, Title VII does not require that all employment decisions have "a manifest relationship to the employment in question." *Griggs*, *supra*, 401 U.S. at 432. Thus, even if the challenged test had the effect of denying these plaintiffs jobs for which they were well qualified, that unfairness by itself does not establish a violation of Title VII. Cf. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981).[12]

2. Requiring validation of every part of a selection process that has a disparate racial impact is neither practical nor useful

To examine each component of a selection process for job relatedness on a showing that the component had a racially disparate impact would, as one court has observed, "launch[] a court on a course that has no boundaries and no clear end." *Brown* v. *New Haven Civil Service Board*, 474 F. Supp. 1256, 1262 (D. Conn. 1979).[13] Nearly every part of a selection process that excludes candidates from further consideration would be vulnerable to challenge under such a

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[12] We note also that a principal claim of unfairness in the treatment of the plaintiffs here (both black and white) arose from the fact that they were allowed to serve in the supervisory positions for long periods of time, thus creating expectations that they would be among those eventually promoted. Any such unfairness is unrelated to the evils at which Title VII is directed.

[13] If a test having disparate racial impact must be validated even though the selection process as a whole does not disadvantage minorities, the next logical step would require validation of subparts of the test or even single questions having a disparate racial impact. See *Brown* v. *New Haven Civil Service Board*, *supra*; cf. *Smith* v. *Troyan*, 520 F.2d 492, 498 (6th Cir. (1975)), cert. denied, 426 U.S. 934 (1976).

standard. But this Court has noted in a related context that '[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 711 n. 20 (1978).

The court of appeals recognized the practical obstacles to such an expansive reading of Title VII, and thus ruled that the Act would not require validation of an employment procedure having a disproportionate adverse impact on blacks as long as all candidates participate in all parts of the process (Pet. App. 12a-14a). This attempt by the court of appeals to limit its theory does not withstand analysis. The court of appeals suggested that the absence of a "pass-fail barrier" to further consideration would make it impossible to ascertain whether one or more of the components had an adverse racial effect. However, to the extent that unsuccessful candidates for selection cannot identify the discriminatory element in the selection process, disparate impact can be measured only by the final result, and the question involved in this case cannot arise. There may be situations in which all candidates are exposed to the entire selection process, but one facet of that process can be shown to exclude blacks in disproportionate numbers in precisely the same way as the test here does. For example, under the court of appeals' theory the employer here would escape liability if he simply had allowed all candidates, regardless of test scores, to participate in every step of the process. Under that system, the employer would be free to consider the results of the test scores, and, on the basis of that

consideration, to promote the same individuals he did under the challenged system. It could still be shown that the lower test scorers were disproportionately black, *i.e.*, that the effect of the test was to exclude disproportionate numbers of blacks from any real chance for promotion even though all were allowed to continue in other steps of the selection process. The final results in both situations would be precisely the same; the same individuals would be effectively excluded by the test. But the court of appeals would require the employer to prove the test's validity in one circumstance but not the other. This approach exalts form over substance. There is no reason why the same principle should not be applied in both cases. "[T]he overall results of the process should be deemed a fair barometer of the fairness of the process" (Pet. App. 14a).[14]

The agencies responsible for enforcing Title VII have wrestled with the same practical problems, and concluded in the 1978 Uniform Guidelines on Employee Selection Procedures that the "bottom-line" principle represented an appropriate guide for the exercise of prosecutorial discretion in the enforcement of Title VII. See 43 Fed. Reg. 38290, 38291. This

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[14] Most lower courts have adopted this approach. See *Friend* v. *Leidinger*, 588 F.2d 61, 66 (4th Cir. 1978); *EEOC* v. *Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979); *Brown* v. *New Haven Civil Service Board, supra; Cormier* v. *P.P.G. Industries, Inc.*, 519 F. Supp. 211, 278-279 (W.D. La. 1981); *Rule* v. *International Association of Bridge, Structural and Ornamental Ironworkers*, 568 F.2d 558, 565 n. 10 (8th Cir. 1977); *Lee* v. *City of Richmond*, 456 F. Supp. 756, 771 (E.D. Va. 1978); *Williams* v. *City & County of San Francisco*, 483 F. Supp. 335, 340 (N.D. Calif. 1979). Cf. *Smith* v. *Troyan, supra.*

conclusion represents the culmination of several years of agency experience in this area.[15]

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[15] The first "Guidelines on Employment Testing Procedures" were promulgated by EEOC on August 24, 1966. We are lodging a copy of these guidelines with the clerk of this Court. They did not directly address the "bottom-line" issue, but in encouraging employers to utilize other methods to supplement tests in making employee selections, the 1966 guidelines are consistent with a "bottom-line" analysis. Thus, they note that "employers who use tests, but treat them as only one of several factors in the hire or promotion process, have found valuable employees in minority groups who would have been excluded if the tests were the sole and controlling factor." Guidelines at 1. And tests were to be viewed "as only one component of the personnel system—no better or worse than the selection system of which they are a part" (*id.* at 2). Moreover, this first version of the Guidelines recognized that "[t]he characteristics of a test, apart from the situation in which it is used, are not sufficient evidence on which to judge its quality" (*ibid.*).

The 1972 Amendment to Title VII created the Equal Employment Opportunity Coordinating Council (composed of the Department of Labor, the Equal Employment Opportunity Commission, the Civil Service Commission, the Civil Rights Commission, and the Department of Justice) and gave it the task of eliminating inconsistencies among the operations of the federal agencies responsible for enforcing federal equal employment opportunity law. Pursuant to this statutory mandate, the council began work in 1973 on the development of uniform guidelines on employee selection procedures.

The effort was not initially successful. In 1976, three of the agencies (Labor, Justice and the Civil Service Commission) issued the Federal Executive Agency (FEA) Guidelines explicitly adopting the "bottom line" principle (41 Fed. Reg. 51734). The EEOC republished its 1970 guidelines (41 Fed. Reg. 51984), which—like the 1966 Guidelines—did not directly address the issue, in part because of its disagreement with the "bottom line" principle. The impasse was eventually resolved in 1978, when the four agencies promulgated the Uniform Guidelines on Employee Selection Procedures that are cur-

II

THE PLAINTIFFS DID NOT REBUT THE EMPLOYER'S SHOWING THAT ITS SELECTION PROCESS WAS NON-DISCRIMINATORY

Plaintiffs established that the promotion test had a disparate racial impact;[16] that was sufficient to carry their burden of going forward. It was not ultimately enough to establish a violation of Title VII. See *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 584 (1979). Here the employer rebutted plaintiffs' showing of the disparate impact of the test by establishing that the final results of the selection process were free of discrimination.[17] Plain-

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rently in effect, adopting the "bottom line" principle to guide the exercise of prosecutorial discretion.

The EEOC does, however, issue reasonable cause determination letters to charging parties on the basis of the disparate impact of tests or other components of the selection process—a practice that comports with our view of the "bottom line" theory as a defense to be established by the employer (see note 17, *infra*).

[16] Compare *EEOC* v. *Greyhound Lines, Inc.*, 635 F.2d 188 (3d Cir. 1980), where there was a failure to make the threshold showing that an employment practice had a disparate racial impact. In that case EEOC urged that the employer's rule prohibiting employees from wearing beards had a disparate impact on blacks. The charging party in the case was a black male who suffered from a skin disease that predominantly affects black males who shave. The court of appeals ruled that EEOC had failed to prove that the no-beard rule produced a disparate impact on blacks at any point in the process. Blacks were hired at a higher rate than the black percentage in the population, and there was no evidence showing that blacks were discouraged from applying because of the no-beard rule.

[17] That burden is properly placed on the defendant; it is a burden of going forward with evidence. Thus, as a conceptual matter, the "bottom-line" theory is best viewed as a defense. Title VII plaintiffs who can show that the test has a disparate impact should not be required to show that the eventual re-

tiffs failed to refute defendants' evidence of the selection process' overall impact by showing that the promotions made were a pretext for avoiding liability to them in this action, or that this case presented any other reason [18] for not taking the "bottom line" results to be the proper measure of whether the employer had violated Title VII.[19]

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sults will also necessarily have such an impact. Once the disparate impact of a test is established, it is reasonable to infer that the process as a whole will have a similar impact and any contrary information would be peculiarly within the knowledge of the employer. In this case, for example, promotions were not made until a month before trial. It is not clear from the record whether the non-discriminatory results were predictable at the outset, but it is likely that they were not, in part because the test was not used for ranking but only as a pass-fail barrier. Thus, until the selections were made, all members of the eligible pool presumably had an equal chance for selection. See pages 4-5, *supra*.

[18] An example might be a showing of a pattern of continued use of tests or other procedures having a disparate impact, which might make pertinent the questions whether the process over the years had produced discriminatory "bottom line" results or whether the process had been changed to avoid further disparate "bottom line" impact not only for the selection process in issue but also for later administrations.

[19] An employer should not be relieved of liability for the use of an unvalidated employment test having a disparate racial impact unless he establishes that it is part of a selection process that has a nondiscriminatory effect. It would not be sufficient to show that the employer has a racially balanced workforce. Past nondiscrimination should not be permitted to immunize present practices. *Furnco*, *supra*, 438 U.S. at 579. See also *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974). Similarly, as this Court ruled in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 341-342, 364 (1977), present nondiscriminatory policies or affirmative action efforts do not extinguish an employer's liability for past discrimination. See also *Furnco Construction*

The court of appeals implies (Pet. App. 9a) that the employer's delay in making promotions here was suspect. But apparently that delay was occasioned by the employer's agreement to accommodate plaintiffs by postponing action pending the outcome of the case. It was only when that accommodation interfered with its operations that the employer sought and received court permission to make the promotions (see page 4, *supra*).

Most of the evidence in the case dealt with the question of the test's validity; there is no detailed description of other parts of the selection process.[20]

Corp., supra, 438 U.S. at 584-585 (Marshall, J., concurring in part and dissenting in part). The court of appeals' reliance (Pet. App. 15a) on *Teamsters* is thus inappropriate because the employer here seeks only to avoid liability to applicants adversely affected by a process which, as a whole, was shown to be nondiscriminatory.

[20] Nothing in the record indicates that eligible blacks were discouraged from taking the tests. Therefore, the comparison between the percentage of black applicants and the percentage of black successful candidates was apparently an accurate indicator of the effects of the selection process. This would not be true, however, if it were shown that an employer's discriminatory requirements or policy discourage a disproportionately large number of members of the protected group from applying in the first place. See, *e.g.*, *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977) (height and weight limitations discouraged women applicants); *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977); *Teamsters, supra*, 431 U.S. at 365-366. In such a case, the composition of the applicant group will not give an accurate basis for judging the results of the selection process, and thus the use of the "bottom-line" analysis may be inappropriate. The Uniform Guidelines (*supra*, note 15) reflect this concern by requiring validation "where the weight of court decisions or administrative interpretations hold that a specific procedure (such as height or weight requirements or no-arrest records) is not job-related in the same or similar circumstances." 28 C.F.R. 50.14(4C).

The employer based the ultimate promotions on supervisors' recommendations, job performance, and seniority as well as affirmative action considerations.[21] The record does not suggest that the employer eventually promoted a large number of blacks simply to avoid liability in this suit. If there were such evidence, the final results would be, in effect, a pretext (cf. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804-805 (1973)), and the courts would not be powerless to act. As this Court observed in *United States* v. *Oregon Medical Society*, 343 U.S. 326, 333 (1952):

> It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentence and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.

The employer's prior history of hiring blacks and the effects of previous administrations of this or other tests would be relevant to determining whether the promotions were pretextual. Also relevant would be any actions taken by the employer to design the system initially in a way so as to avoid adverse impact.[22] In the absence of evidence of a pretext,

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[21] Respondents have not challenged the affirmative action component of the employer's promotion process under Title VII (*Weber*, *supra*, 443 U.S. at 208-209), or under the Equal Protection Clause (*id.* at 200). It is doubtful whether they would have standing to raise these issues.

[22] See, *e.g.*, *EEOC* v. *Navajo Refining Co.*, 593 F.2d 988 (10th Cir. 1979), where the employer eliminated the disparate adverse effects on Spanish-surnamed Americans of a high school education requirement and testing devices by using a racial factor to adjust the test scores.

however, the court need not inquire into the means utilized to alleviate the disparate impact of the test.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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